IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO 569 of 2002
with
CIVIL APPLICATION NO 5603 of 2002
in
SPECIAL CIVIL APPLICATION NO 9314 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNION BANK OF INDIA

Versus

SHIVPRAKASH P. MALHOTRA

Appearance:
1. LETTERS PATENT APPEAL No. 569 of 2002
MR KM PATEL for Appellant No.
MR DHARMENDU PANDYA for MR DEVNANI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 18/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. Appellant - Union Bank of India and others have challenged in this Appeal the Judgment and order dated 18.7.2002 passed by the learned Single Judge of this Court (Akshay H.Mehta,J.) in Special Civil Application No.9314 of 2001 whereby the learned Single Judge allowed the writ petition filed by the respondent - original petitioner and directed the present Appellant to reinstate the original petitioner on his original post with full wages and continuity of service on condition that the original petitioner shall repay the amount of Rs.13,53,351.73 ps. which was actually received by him under the V.R.S. Scheme at the rate of 9 % till the date of repayment. The original petitioner was directed to repay the said amount on or before 31.8.2002.

2. The present Letters Patent Appeal was filed by the Appellant before this Court on 5.8.2002 and it was straightway admitted by the Division Bench of this Court (J.N.Bhatt & J.R.Vora, JJ.) on 20.8.2002 and it was ordered to be heard with L.P.A. No.354/02. However, the said L.P.A. No.354/02, filed by another Bank i.e. Dena Bank, against its employee was segregated and dismissed by this Court on 17.8.2003 in view of the Judgment of the Hon'ble Supreme Court in the case of BANK OF INDIA & ORS. v/s O.P. SWARNAKAR & ORS. reported in 2003 (2) SCC 721, as in that case the respondent employee had not accepted the exgratia payment. In this Appeal the respondent original petitioner had already accepted the exgratia payment before approaching this Court, therefore, this Appeal is required to be heard and decided on merit in view of the aforesaid Judgment of the Hon'ble Supreme Court in case of Swarnakar (Supra). The Appellants have also filed Civil Application no.5603 of 2003 in this Appeal wherein the same Division Bench issued Rule on 20.8.2002 and granted ad.interim relief of status-quo and accordingly the said relief has continued till today. In view of the ad.interim relief granted the respondent original petitioner is out of job till today. Under the circumstances, we are required to decide this Appeal on merits in accordance with law.

3. Learned Counsel Shri Patel for the Appellant, relying on the Judgment of the Hon'ble Supreme Court in Swarnakar's case (supra) vehemently submitted that the Judgment and order passed by the learned Single Judge, allowing the writ petition of the respondent petitioner, is required to be quashed and set aside because in the instant case the respondent - original petitioner approached this Court after accepting the exgratia

payment. He has mainly relied upon the observation made by the Hon'ble Supreme Court in Paras : 114 and 115 of Swarnakar's case (Supra), which we would like to reproduce, which are as under :

> 114. However, it is accepted that a group of employees accepted the exgratia payment. Those who accepted the exgratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom.
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> 115. The scheme is contractual in nature. The contractual right derived by the employees concerned, therefore, could be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand.

Alternatively, Shri Patel submitted that, in any case, learned Single Judge ought not to have awarded full backwages to the respondent petitioner while passing the order of reinstatement in service. He submitted that on his own the respondent - petitioner initially applied for voluntary scheme under V.R.S. Scheme on the first day of its introduction i.e. on 1.12.2000. Not only that, he accepted the exgratia payment worth Rs. 13,55,351.73 ps. on 20.4.2001. He submitted that it is because of the news item and the orders passed by the various High Courts of this Country he approached this Court by way of writ petition only on 8.10.2001. He, therefore, submitted that applying the principle of "NO WORK NO PAY" the learned Single Judge should not have awarded at least backwages.

4. About the second submission made by Shri Patel regarding backwages awarded by the learned Single Judge, while allowing the writ petition of the petitioner, we must state that learned Counsel Shri Dharmendu Pandya for the respondent - original petitioner straightway conceded that the part of the order passed by the learned Single Judge awarding full backwages while passing an order of reinstatement be quashed and set aside as he does not claim for backwages provided the Appellant - bank takes back him in service latest by 1.11.2003. He further assures this Court that as directed by the learned Single Judge he will repay the amount of rs.13,5,351.73 ps. with interest at the rate of 9 % till the date of repayment on or before 30.10.2003 by way of A/c Payee cheque to the appellant Bank. This takes care of the

second submissions made by Shri Patel. Thus, we are required to consider the first submission made by Shri Patel as to whether the Judgment and order passed by the learned Single Judge allowing the writ petition filed by the respondent - petitioner reinstating him in service with continuity should be quashed and set aside or not.

5. For considering the aforesaid submission made by Shri Patel, few important facts are required to be mentioned, which are as under :

i) The respondent - original petitioner joined the Appellant - Bank as Clerk way back on 8.11.1978. Because of his sincerity, honesty and hard work he was promoted from time to time and the date on which i.e. on 1.12.2000 when he submitted an Application for voluntary retirement under VRS Scheme of 2000 he was working as Branch Manager, Museum Branch, Ahmedabad. Thus, he had put on more than 22 years of excellent blotless service. He was born on 16.3.1953. if he had not applied for voluntary retirement then on reaching the age of superannuation at the age of 60, he would have retired in March, 2013. Thus, when he applied for voluntary retirement under the VRS Scheme he was hardly 47 years. He was so much devoted to the Bank's service that he could not give proper attention to his aged bed-ridden parents. His father was paralytic and confined to bed while his mother lost her both the eyes.

ii) The Appellant - Union Bank of India introduced Voluntary Retirement Scheme, 2000, on 7.11.2000 which was to come into force with effect from 1.12.2000 to 31.12.2000. Accordingly, the respondent - original petitioner applied for voluntary retirement under the Scheme on 1.12.2000. The said Application was received by the bank and acknowledged on 2.12.2000;

iii) It may be stated that though the Application was required to be processed and the decision was required to be taken at the earliest, for the reasons best known to the Bank it had not taken any decision on his withdrawal Application dtd.1.3.2001 for voluntary retirement for a considerable time. The Bank took the decision for the first time on 30.3.2001 on the Application dated 1.12.2000 of the respondent petitioner for voluntary retirement (Annexure : F) i.e. after a period of almost 4 months and informed the petitioner that his Application

dated 1.12.2000 seeking voluntary retirement has been accepted by the Competent Authority and he shall stand relieved from the services of the Bank on 20.4.2001 after office hours. He was also informed that his exgratia/retirement benefit will be paid in due course, after submission of claim forms/application. Accordingly, the petitioner was relieved from service and paid exgratia payment of Rs.13,55,351.73 ps. after deducting Rs.412587/taken by the petitioner for the loan advanced to him, from total sum of Rs.17,77,944.73 ps. It was accepted by him on 20.4.2002 under protest as his withdrawal Application dated 1.3.2001 for voluntary retirement was not considered and decided by the bank.

iv) On 30.6.2001 the respondent - petitioner submitted an Application to the Bank (Annexure:H) stating that while taking decision dated 30.3.2001 accepting his Application for voluntary retirement the Bank had not considered his request made on 1.3.2001 for continuing his service in the Bank as well as the submission made by the Deputy General Manager, Zonal Office, Ahmedabad, by his letter dated 2.3.2001 (Annexure:G) wherein the Deputy General Manager stated that the petitioner was sincere and dedicated officer of the Bank. It is also stated in his Application at Annexure : H dated 30.6.2001 that he was shunted out of the Bank's service without giving any credit for his labour rendered to the institution in various branches/department and his work done in Branch, deposits obtained from the market and the service rendered to the Bank by keeping his family away from his place of posting were not at all taken into consideration. His family circumstances and the condition of his aged bed-ridden parents were also not taken into consideration. He has further stated in his Application that he had already submitted his Application for withdrawal of his Application for voluntary retirement, therefore, if his request is accepted and he is allowed to continue in Bank then he is prepared to refund the entire amount received by him from the Bank. He has also made it clear that the payment made to him was accepted by him under protest and without prejudice to his legal rights of seeking withdrawal of his offer of voluntary

retirement. He has also pointed out to the Bank that large number of cases were filed in different High Courts and in some cases the Courts granted stay keeping in view the practical difficulty experienced by the service class. However, instead of approaching the Court he has approached the Bank first for redressal of his grievance.

vi) The aforesaid Application dated 30.6.2001 of the petitioner was replied by the bank on 24.7.2001 (Annexure : A), wherein the Bank had stated that the employee submitting his Application for voluntary retirement under the Scheme shall not have the option to withdraw the same and having sought voluntary retirement under the Union Bank of India Voluntary Retirement Scheme 2000-2001 his subsequent Application to continue in Bank service can not be accepted.

vii) On 17.8.2001 the petitioner wrote to the Bank to reconsider its decision in view of the Judgment of Delhi High Court in another case (Annexure:K).

6. However, the Bank did not reconsider its decision in the case of petitioner, therefore, the petitioner approached this Court by way of Special Civil Application No.9314 of 2001 on 8.10.2001. On 12.10.2001 the learned Single Judge of this Court (C.K.Buch,J.) issued Notice making it returnable on 28.11.2001. Thereafter, the matter was adjourned from time to time before different Hon'ble Judges of this Court and finally it was heard and allowed by Akshay H.Mehta,J. on 18.7.2002 after hearing the learned Counsel for the parties and the Bank was directed to reinstate the petitioner in service with continuity and also ordered to pay full backwages.

7. Whether an employee, who opts for voluntary retirement pursuant to or in furtherance of a scheme floated by the nationalized banks and the State of India would be precluded from withdrawing the said offer ? This question was raised in Batch of Appeals before the Hon'ble Supreme Court, in case of Bank of India v/s. O.P.Swarnakar & ors., reported in (2003) 2 SCC 721. For the reasons recorded in the Judgment the Hon'ble Supreme Court issued the following direction :

1) The appeals preferred by the nationalized banks arising from the High Courts are dismissed except the cases where the employees concerned have accepted a part of the benefit under the Scheme.

However, in respect of such of the employees who despite acceptance of a part of the retirement benefit under the Scheme had continued under the orders of the High Court and has retired on attaining the age of superannuation, this order shall not apply;

2) The appeals filed by the State Bank of India are allowed;

3) The appeals arising from the judgments of the Uttaranchal High Court are allowed and the Judgments of the said High Court are set aside;

4) The appeals arising from the judgments of the Punjab and Haryana High Court in relation to ten writ petitions which were filed by the employees for a direction upon the Bank that the benefits under the Scheme be paid to them are set aside and the matters are remitted to the High Court for consideration thereof afresh on merits and in accordance with law.

From the aforesaid Judgment of the Hon'ble Supreme Court in Swarnakar's case (supra) it is clear from Para : 74 of the Judgment that the Hon'ble Supreme Court has in no uncertain term held that it has no hesitation in coming to the conclusion that the voluntary Scheme was not a proposal or an offer but merely an invitation to treat and the applications filed by the employees constituted an offer.

The aforesaid observation and directions issued by the Honourable Supreme Court in Swarnakar's case (supra) while deciding the following two legal Issues which are as under :

A. Whether an application by an employee to secure voluntary retirement under the Voluntary retirement under the Voluntary Retirement Scheme (VRS) can be withdrawn by such an employee before the same is accepted by the competent authority though the Scheme contained an express stipulation that an application made thereunder is irrevocable and the employee will have no right to withdraw the application once submitted?

B. Whether upon making an application under VRS the employer bank secures the authority to unilaterally determine one way or the other the jural relationship of master and servant between

the parties ?

8. It is no doubt true that the Hon'ble Supreme Court in Para : 114 has observed that "however, it is accepted that a group of employees accepted the exgratia payment. Those who accepted the exgratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom."

9. Similarly the Hon'ble Supreme Court observed in Para : 115 of Swarna's case (supra) that "the scheme is contractual in nature. The contractual right derived by the employees concerned, therefore, could not be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand."

10. Relying upon the aforesaid decision in Para : 114 & 115 of Swarna's case (supra), Shri Patel vehemently submitted that in the instant case respondent having accepted the benefit and exgratia payment from the Bank on 20.4.2001 can not subsequently challenge the decision of the bank in accepting his Application of voluntary retirement.

11. There cannot be any quarrel with the principle laid down by the Hon'ble Supreme Court and the observations made in Swarna's case (supra), more particularly Para ; 114 & 115 which we have reproduced hereinabove. However, the observation made by the Hon'ble Supreme Court in Para : 115 of its Judgment in Swarna's case (supra) clearly shows that the Hon'ble Supreme Court was considering the case of those employees who accepted part of the benefit voluntarily and without prejudice. Those employees who accepted the benefits cannot be allowed to approbate or reprobate nor they can be permitted to resiled from their earlier stand. However, that is not the case here. But, that is not the case here.

12. In the instant case we have already set out few important facts of the case in a nutshell. The facts stated hereinabove make it clear that when the petitioner made an Application for voluntary retirement under the Scheme on 1.12.2000, the circumstances were totally different. If the Bank had taken decision immediately or within reasonable time, then perhaps the petitioner would not have been in a position to make any grievance about it. But, the Bank did not take any decision on his Application of voluntary retirement for a pretty long

time i.e. for a period of about 4 months. During that period the circumstances of the petitioner completely changed which compelled him to withdraw his Application for voluntary retirement and accordingly he submitted his withdrawal Application on 1.3.2001. It is unfortunate that no favourable decision was taken by the Bank on it though, none-else but the Deputy General Manager of the Bank by his letter dated 2.3.2001 strongly recommended his case by stating that he was sincere and dedicated officer of the Bank. Thus, without taking any decision on his withdrawal Application after a long time, the Bank took decision on 30.3.2001 and accepted his Application dtd. 1.12.2000 for voluntary retirement and informed the petitioner that he will stand relieved with effect from 20.4.2001 After Office Hours and he was compelled to accept the exgratia payment on 20.4.2001. It is clear that the said amount was accepted by the petitioner under pressure and, therefore, he had to accept it under protest by keeping his legal option open. Thus, merely because he accepted exgratia payment on 20.4.2001 it cannot be said that willingly he accepted it. Under the circumstances we are of the considered opinion that the case of the present respondent - original petitioner does not fall in the parameter of Paras : 114 & 115 of Swarna's case (supra), decided by the Hon'ble Supreme Court.

13. In Para : 121 of Swarnakar's case (supra) the Hon'ble Supreme Court has clearly held that "the right of the employee to continue in employment, which is a fundamental right under Article 21 of the Constitution of India could not have been taken away except in accordance with law." It is breached in this case.

14. We may also state that this is not a case where after accepting the Application of voluntary retirement of the petitioner the Bank made any alternative arrangement acting on his resignation or letter of voluntary retirement by appointing other employee for this job. In fact, the respondent - original petitioner had applied for retirement under the voluntary retirement Scheme and the purpose and object of the bank was to relieve as many as officers possible from its service under Voluntary Retirement Scheme. We can understand that if the respondent - original petitioner was not that competent who could be continued in the bank's service. That is not the case in the instant case. As stated earlier by us, the petitioner joined services in the Bank as Clerk on 8.11.1978 at the age of 25 years and within no time, because of his hard-work, skilled and dedication, he got promotion from time to time and

reached the post of Branch Manager within a period of 22 years of service. When he applied for voluntary retirement he was hardly 47, if he had not applied for voluntary retirement then he could have continued in service upto the age of 60 years. Today he is 50, therefore, his services could be very well utilized by the Bank. All these aspects were never taken into consideration by the Bank while accepting his Application for voluntary retirement, though his own Deputy General Manager on 2.3.2001 strongly recommended his case and opined that he was sincere and dedicated officer of the Bank.

15. This brings us to the Judgment of the learned Single Judge, which is assailed by the learned Counsel Shri Patel for the Appellant in view of the subsequent Judgment of the Hon'ble Supreme Court in Swarnakar's case (supra). As pointed out earlier, with utmost respect to Shri Patel, the aforesaid Judgment in Swarnakar's case (supra) will not help Shri Patel in the instant case for the reasons stated hereinabove.

16. Before parting, we must state that an attempt was made by the learned Counsel by submitting that the petitioner waited till October, for a period of six months after his Application for voluntary retirement was accepted by the Bank i.e. from 30.3.2001. Thus, there was a delay of 6 months and, therefore, the learned Single Judge should not have exercised his discretion. As stated earlier, the respondent has explained the delay of 6 months in approaching this Court. Initially before his Application for voluntary retirement was accepted he tried to withdraw his Application on 1.3.2001. Thereafter, also he continued to make representation before approaching this Court and it is only when the Bank did not accept his Application, therefore, at last he approached this Court in October, 2001 by way of writ petition. Under the circumstances the delay of 6 months cannot be said to be a delay much less gross delay and if there is any delay the same is properly explained. When the learned Single Judge of this Court has exercised his extraordinary jurisdiction in favour of the petitioner discarding this contention of delay then certainly this Court would not interfere with such order in this Appeal.

17. However, as stated earlier, this Appeal is required to be partly allowed on the limited point of backwages. We are of the considered opinion that principle of "NO WORK NO PAY" would apply in this case. Learned Counsel Shri Pandya practically conceded that on facts of this case there was no question of backwages,

provided he is taken back in service on or before 1.11.2003.

18. In view of the above discussion, this Appeal is partly allowed and the part of the order passed by the learned Single Judge awarding backwages to the respondent - petitioner is hereby quashed and set aside. Rest of the order passed by the learned Single Judge is confirmed. The respondent petitioner shall now repay the amount which he had received by way of exgratia payment with interest at the rate of 9 % on it till 31.10.2003. The Bank shall reinstate the respondent latest by 1.11.2003. No order as to costs.

Civil Application No.5603 of 2002 is disposed of as the main Appeal is disposed of.

The copy of this Judgment be given to Shri K.M. Patel for the Appellant adn Shri Dharmendu Pandya for the Respondent forthwith.

(B.J. Shethna, J.)

Date : September 18, 2003

(Ravi R.Tripathi,J.)

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